United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

TO BE ARGUED
BY DAVID N. ROSEN

76-7263

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-7263

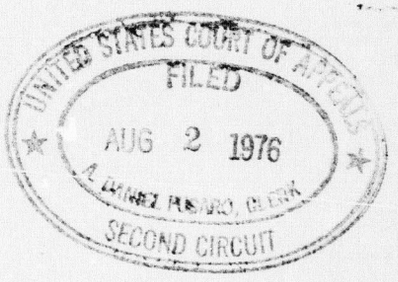
JOHN E. WILLIAMS,

Plaintiff-Appellant

V.

JOSEPH A. WALSH, ETC.

Defendants-Appellees



ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

APPELLANT'S BRIEF

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STATUTES INVOLVED

Connecticut General Statutes

Sec. 52-577. Action founded upon a tort. No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of.

Sec. 52-592. Accidental failure of suit; allowance of new action. If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the writ was abated, or has been erased from the docket for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been arrested, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment. When any action has been brought against an executor or administrator or continued against an executor or administrator after the death of the defendant and has failed for any of the causes above mentioned, the plaintiff, or his executor or administrator in case a cause of action survives, may commence a new action within six months after such determination of the former one. If an appeal is had from any such judgment to the supreme court, the time such case is pending upon such appeal shall be excluded in computing the time as above limited. The provisions of this section shall apply to any defendant who files a cross complaint in any action, and to any action between the same parties or the legal representatives of either of them for the same cause of action or subject of action brought to any court in this state, either before dismissal of the original action and its affirmance or within one year after such dismissal and affirmance, and to any action brought to the United States circuit or district court for the district of Connecticut which has been dismissed without trial upon its merits or because of lack of jurisdiction in such court, and, if such action is within the jurisdiction of any state court, the time for bringing such action to such state court shall commence from the date of such dismissal in the United States court, or, if an appeal or writ of error has been taken from such dismissal, from the final determination of such appeal or such writ of error.

QUESTIONS PRESENTED

1. Is plaintiff's claim for reinstatement as a police officer, alleging he was unconstitutionally discharged, time-barred where an action for reinstatement would be timely under Connecticut law but where plaintiff has joined it to a damage claim sounding in tort which may be time-barred?

2. Is plaintiff entitled to the benefits of Connecticut's saving statute as a matter of federal common law where the policies of the statute apply to this case but Connecticut doctrine may exclude plaintiff's state court appeal from its coverage?

STATEMENT OF THE CASE

Proceedings Below

Plaintiff-appellant John Williams asserted in this 42 U.S.C. § 1983 action that he was illegally discharged from the Bridgeport Police Department after he declined on Fifth Amendment grounds to answer questions put to him in a Department hearing. Cross-motions for summary judgment were made in the District Court, and the defendants Police Superintendent and Board filed a supplementary motion for summary judgment claiming that the action was barred on the grounds of the statute of limitations and laches. Appendix page (hereinafter "App.") 19. The District Court in an opinion by Magistrate Latimer (endorsed "So Ordered" by Judge Newman) granted summary judgment for the defendants on the ground that the Connecticut tort statute of limitations was applicable and barred this action. This appeal followed.

Facts

Plaintiff's Discharge.

Plaintiff was employed as a patrolman in the Bridgeport Police Department. He was a permanent employee of the City protected by Civil Service. In November 1969, he was charged with improper use of his firearm and filing a false police report in violation of Department rules. App.21.

The charges were based on a complaint by a motorist and his companion that Williams had fired several shots at them after a high speed chase for a motor vehicle violation. Williams had filed a police report denying use of his weapon. (See hearing transcript attached to Record Document No. 24).

At the hearing on these charges before the Board of Police Commissioners, Williams was called to the witness stand by the Board, put under oath and asked a series of questions. App. 22. He was not directed to answer any of the questions posed, nor was he advised that his refusal to answer would or might be considered grounds for discharge (or in any way a violation of departmental rules). He was not advised that his answers and their fruits could not be used against him in any criminal proceeding. Ibid. Instead, the Board deliberated, found plaintiff guilty of the charges relating to the shooting incident, and sentenced him to a forty-day suspension without pay.

At the conclusion of the suspension period, Williams was again suspended without pay by Defendant Walsh, the Superintendent of Police, this time for his refusal to answer questions, which was alleged to violate that portion of Rule 98 of the Bridgeport Police Department prohibiting "conduct prejudicial to the good order and police discipline of the Department." App. 23.

A hearing was held January 13, 1970, on the charge of violation of Rule 98, at which members of the Police Department testified to their opinion that Williams' refusal to answer questions was in fact "conduct prejudicial to the good order and police discipline of the Department," App. 32, 47-48, 57, although neither he nor other members of the Department had ever been so advised. App. 33, 38, 42, 46, 56, 61. At the conclusion of the hearing, also on January 13, 1970, plaintiff was discharged from the Department by the Board for violation of Rule 98. App. 62.

Within days of his discharge, plaintiff filed an appeal from the Police Board's decision to the Connecticut Court of Common Pleas. App. 64. He also pursued a contractual right to arbitration resulting in an unfavorable award that was sustained by the Connecticut Superior Court. The appeal to the Court of Common Pleas languished for almost four years. When it was reached for trial, the Board requested that it be dismissed, and on December 7, 1973, the court did dismiss it for lack of jurisdiction.

31 Conn. Supp. 125, (C.P. Htfd. Cty. 1973). App. 71.*

The Civil Rights Action.

This action was filed March 24, 1974. In it Williams claimed that his discharge was unconstitutional because he had received none of the procedural protections relied on by this Court in Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation, 426 F.2d 619 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1972) (hereinafter Sanitation Men II**), to sustain the discharge of public employees for refusal to answer questions, including (1) "assur[ance] of protection against use of his answers or their fruits in any criminal proceeding," Sanitation Men II, supra,

* Defendants raised below the claim that this action is barred by the principles of res judicata and collateral estoppel because the Connecticut Superior Court adjudicated at least one aspect of the Fifth Amendment claim, and the due process claims were raised, though not decided, in the appeal to the Court of Common Pleas. The District Court apparently agreed that at least plaintiff's central claims of lack of procedural protection and discharge pursuant to an unconstitutional rule were not barred by res judicata or collateral estoppel. App. 76. See Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S.976 (1975). If this Court agrees with plaintiff on the limitations issue, this case should be remanded to the District Court for full consideration of the res judicata and collateral estoppel claims in the first instance.

** Sanitation Men II was decided by this Court after proceedings held in the wake of the Supreme Court's decision in Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation, 392 U.S. 280 (1968).

426 F.2d at 626, see id. at 621; and (2) warning that he might "be subject to disciplinary action...for the failure to answer material and relevant questions..." Sanitation Men II, supra, 426 F.2d at 621. It was precisely the failure to give some assurance of use immunity that has led two appellate courts, relying on Sanitation Men II, to find discharges of public employees illegal. See Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973), and Confederation of Police v. Conlisk, 489 F.2d 891 (7th Cir. 1973), cert. denied sub nom Rochford v. Confederation of Police, 416 U.S. 956 (1974).

Williams's claim was based on receipt of even less notice than that given employees in Kalkines and Conlisk. Unlike them, he was not even advised that his failure to answer questions might subject him to discipline, and, in fact, at no time was he even directed to answer the questions put. In these circumstances he could have no assurance that a court would find his answers "compelled" for Fifth Amendment purposes and accordingly no assurance that his answers or their fruits would not be used against him in a subsequent criminal prosecution, see Garrity v. New Jersey, 385 U.S. 493 (1967).

Moreover, Williams had no notice that his claim of constitutional privilege violated the rule against "conduct prejudicial to...good order and police discipline." Accordingly he also challenged the rule as unconstitutionally vague on its face, a challenge almost identical to one recently sustained by the Court of Appeals for the Seventh Circuit. See Bence v. Breier, 501 F.2d 1185 (7th Cir. 1974), cert. denied, 419 U.S. 1121 (1975).

After detailing these claims of unconstitutional discharge (and suspension preceding the discharge) for some thirty-seven paragraphs and ten pages of his complaint, Williams also alleged without elaboration that the actions of those members of the Police Board who discharged him were "willful and malicious and done with the intent to deprive" him of his rights. App. 15. For relief Williams claimed reinstatement with backpay, a declaratory judgment that his discharge and the rule pursuant to which he was discharged was unconstitutional on its face, an injunction against enforcement of the rule, and damages. App. 15-16.

Although plaintiff suggested that the most analogous state cause of action for limitation purposes would be a claim for reinstatement -- in Connecticut a mandamus action -- and defendants suggested it was most like an action for back pay, the Magistrate found instead that the action

was essentially a tort action for limitation purposes. He read the complaint as going "far beyond the claim for equitable redress for wrongful discharge," App. 77, because it asserted "rights to damages for such injuries as 'great pain and suffering of mind, and great embarrassment and humiliation', allegedly resulting from purposeful misconduct in the claimed deprivation of civil rights." Ibid.

Since the action was filed more than three years after Williams's discharge allowed by Connecticut's tort limitation statute, Conn. Gen. Stats. § 52-577, the Magistrate held it barred, although it was filed soon after the jurisdictional dismissal of the Court of Common Pleas appeal, which in turn was filed right after plaintiff was discharged.

SUMMARY OF ARGUMENT

Plaintiff's Civil Rights Act claim for reinstatement as a police officer is most closely analogous to a Connecticut mandamus action, and should therefore be governed by the same time limitation as that action, namely, the equitable doctrine of laches. The District Court did not really dispute the closeness of the analogy but held that the complaint's inclusion of a damage claim and an allegation of intentional deprivation of rights made this action most like a tort claim for limitation purposes. This analysis overlooks the primacy of the claims analogous to mandamus in the complaint and, more fundamentally, the more reasonable approach of limiting the reinstatement claim as mandamus would be limited and limiting any other claims set forth in the complaint by the state limitation period appropriate for them. Analyzing each claim presented, rather than attempting to find a single "essence" in each complaint, is the approach dictated by Connecticut and federal case law. It sensibly avoids requiring plaintiffs to file a multiplicity of suits concerning a single transaction, and it prevents the anomaly of having plaintiff's reinstatement claim barred in federal court in the name of parity of limitations between state and federal courts when it is not barred in state court.

No federal policy prevents application of an equitable period of limitation when the State would apply such a period to its analogous cause of action. On the contrary, application of an equitable limitation is required if the federal courts are to borrow the state limitation period applicable to the most closely analogous state claim. Applying the doctrine of laches to this case, plaintiff's claim is not barred because he diligently pursued his claim of reinstatement in the courts from the time of his discharge through the filing of this action.

Finally, even if a statutory limitation is held to apply, this action is preserved by Connecticut's saving statute. Though Connecticut doctrine might hold the statute inapplicable to this case because of the form of plaintiff's state court action, as a matter of federal common law this court should construe the saving statute to apply to this action in order to preserve the claim of a diligent plaintiff from procedural default.

ARGUMENT

I. PLAINTIFF'S CLAIM FOR REINSTATEMENT IS GOVERNED BY THE EQUITABLE LIMITATION APPLICABLE TO A CONNECTICUT MANDAMUS ACTION AND IS NOT TIME-BARRED.

A. Mandamus is the State of Connecticut Cause of Action Most Similar to Plaintiff's Claim for Reinstatement.

Since 42 U.S.C. § 1983 does not have a statute of limitations, "the federal courts borrow the state statute of limitations applicable to the most similar state cause of action." Kaiser v. Cahn, 510 F.2d 282, 284(2d Cir. 1974). Plaintiff's central claim -- that he was discharged illegally and is entitled to reinstatement -- states a cause of action that under Connecticut law would be appropriately characterized only as mandamus. Connecticut cases establish the proposition that mandamus is the proper remedy for a public officer (including a police officer) claiming illegal discharge and seeking reinstatement. See, e.g., Holley v. McDonald, 154 Conn. 228 (1966); Andrews v. New Haven, 153 Conn. 156 (1965); Bartlett v. Rockville, 150 Conn. 428 (1963); Thompson v. Troup, 74 Conn. 121 (1901); cf. Olcott v. Pendleton, 9 Conn. Supp. 528 (C.P. Htfd. Cty. 1941). Moreover, it is ordinarily the only proper cause of action. In Bartlett v. Rockville, supra, for example, a police officer's claim for reinstatement was rejected because he had

sought an equitable injunction rather than mandamus.*

This Court's opinion in Swan v. Board of Higher Educ., 319 F.2d 56 (2d Cir. 1963) shows decisively that plaintiff's claim for reinstatement is most closely analogous to a mandamus action for purposes of selecting an appropriate limitations period. In Swan, which was not cited by the District Court, a former public college student sought correction of his suspension, claiming that it was unconstitutional. This Court held that New York's limitation on liabilities created by statute was directly applicable to Swan's claim since his cause of action arose from the Civil Rights Act, a statute. 319 F.2d at 60. Connecticut lacks a comparable statute of limitations, but Swan is significant because the Court also ascertained the most analogous cause of action by determining that "if plaintiff were seeking relief in a state court, the appropriate remedy would be the legal remedy provided by Article 78 of the Civil Practice Act." Id. Article 78 is New York's equivalent of Connecticut's mandamus remedy. Indeed the present § 7801 CPLR (formerly

* The existence of a state remedy by appeal in some cases does not make mandamus a less appropriate analogue of plaintiff's cause of action for reinstatement, since mandamus is appropriate even where there is a remedy by appeal. Tremp v. Board of Public Safety, 13 Conn. Supp. 70 (Super. Ct. 1944) (policeman claiming unlawful discharge).

CPA § 1283) provides that "relief previously obtained by writs of certiorari to review, mandamus or prohibition, shall be obtained in a proceeding under this article." (Emphasis added). As Article 78 is to New York law, then, mandamus is, at least with respect to reinstatement of police officers, to Connecticut law. The time limitation on this § 1983 claim for reinstatement ought therefore to be the limitation Connecticut imposes on mandamus actions. That limit is "the equitable principle of unreasonable delay." Sullivan v. Morgan. 155 Conn. 630. 635 (1967), or laches.

B. The District Court's Conclusion that Connecticut's Tort Limitation Governs This Action Misconceives the Complaint and Erroneously Fails to Recognize that Plaintiff's Different Claims for Relief May Have Different Time Limitations.

The District Court rejected mandamus as the most analogous state cause of action not because plaintiff's complaint omitted any of the elements of a mandamus claim but because it contained additional claims as well: it went "far beyond the claim for equitable redress for wrongful discharge which might be expected in such a proceeding, asserting rights to damages for such injuries as 'great pain and suffering of mind, and great embarrassment and humiliation', allegedly resulting from purposeful mis-

conduct in the claimed deprivation of civil rights." App. 77. This analysis misjudges the main thrust of the complaint, and, more fundamentally, it misconceives the nature of the search for limitation periods under federal statutes such as § 1983.

While the complaint contains a damage claim and a claim of intentional misconduct, conclusorily stated, its emphasis is overwhelmingly on conduct whose illegality does not depend at all on the intentions of the defendants. See pp. 4 - 6 , supra. Plaintiff claimed he was discharged pursuant to a facially unconstitutional rule and without the procedural protections required under the Constitution. These allegations are spread out over nearly forty paragraphs of the complaint. By contrast one paragraph alleges intentional misbehavior and part of another claims the injuries quoted by the District Court. Several of the defendants are not even sued in their individual capacities; at least as to them, the present members of the Police Board who were not sitting at the time plaintiff was discharged, only a claim of reinstatement is alleged. As to the defendants sued individually, the claim for reinstatement and the facts supporting that claim are clearly at the heart of the complaint.

But if the District Court erred in its determination

of the state claim the complaint most nearly resembled, it erred more fundamentally in its assumption that a federal Civil Rights Act complaint must be read as if it could contain only one state cause of action for limitation purposes. Like many complaints, plaintiff's in fact combined at least two causes of action, one of them mandamus and the other in tort, and as the tort claims were governed by the tort statute of limitations so the mandamus claim was governed by the limitation applicable to mandamus claims -- the limit set by the doctrine of laches.

The characterization of a cause of action under federal law for purposes of applying a state limitation period is said to be a question of federal law, but one in which State law is ordinarily followed absent some countervailing consideration of federal policy. Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1966); Johnson v. Railway Express Agency, Inc., 421 U.S. 464, (1975); see Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir. 1961), cert. denied, 368 U.S. 821 (1961); Bertha Building Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), cert. denied, 361 U.S. 960 (1960). Under Connecticut or federal law, it is established that limitation periods are chosen for each cause of action, not one to a complaint. Under Connecticut and federal law, whatever the limitation period on plaintiff's damage claim, his claim for reinstatement which is analogous to mandamus

is governed by the measure of limitation applicable to mandamus actions.

The leading federal case is Beard v. Stephens, 372 F.2d 685 (5th Cir. 1967). There the Fifth Circuit analyzed a § 1983 complaint and determined that it stated claims analogous to several state law claims with differing statutes of limitations. The court's rationale for its approach is squarely applicable to this case:

> We are not dealing with semantics. Having defined the "essential nature" of appellants' claim in all its aspects, and having looked then to the Alabama law we find the claim barred in some aspects by the one-year statute and in others not barred. Federal policy neither requires nor allows the federal courts to define the nature of the action in one mold for purposes of determining the statutory period and another mold for determining what parties are liable and for what.

372 F.2d at 690. See also Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958); Funk v. Cable, 251 F. Supp. 598 (M.D. Pa. 1966).

Connecticut law has long held that one complaint may state more than one cause of action for limitation purposes. The Connecticut Supreme Court held in Hickey v. Slattery, 103 Conn. 716 (1926) that a complaint against a doctor which was barred insofar as it sounded in tort might yet not be barred in contract. The Court held that "two distinct causes of action may arise out of one delict,

and where that occurs, each is governed by the statute of limitations appropriate to it. 103 Conn. at 720 (citing authorities). See also Shinabarger v. United Aircraft Corp., 381 F.2d 808 (2d Cir. 1967); Manjuck v. Stamford Hall Co., 15 Conn. Supp. 434 (Super. Ct. 1948).

If a federal court were not required to analyze individually each claim in a Civil Rights action to ascertain the state cause of action most analogous to it for limitation purposes, plaintiffs in Williams's position would be obliged to file several complaints, each stating a claim comparable to a different state cause of action.

In this case, plaintiff could have filed two complaints simultaneously: one omitting the allegations of intentional misconduct, pain and suffering and the damage claim, and the other including those claims. Under the reasoning of the District Court the first complaint would be governed by the mandamus limitation, the second by the tort limitation. The first would not be barred while the second would. Such a rule is antithetical to the spirit of the Federal Rules. Substantive rights are not to turn on the forms of pleading, and "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is encouraged." United Mine Workers v. Gibbs, 383 U.S. 715, 723-725 (1966); see Fed. R. Civ. P. 1, 2, 18-20, 42.

It may be objected to this analysis that applying different limitations to different claims within the same complaint would result in inconsistent or confusing results. Cf. Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962). But this is an argument -- made in Smith v. Cremins -- in favor of utilizing one state limitation for all § 1983 actions, a solution that is unavailable in Connecticut. It is not a reason to urge that though each § 1983 action might have a different limitation period, no action may be found to be governed by more than one such period. The latter solution, which was chosen by the District Court, simply combines inconsistency between claims with rigidity in the treatment of each complaint and encourages artificial multiplication of complaints.

Moreover, a central policy of the rule that state limitations will be borrowed for federal claims would be defeated if the limitation applicable to mandamus were not applied to plaintiff's claims for relief analogous to mandamus. That policy is to make a federal forum available to litigants whose analogous state law claims are not barred by limitations. This Court discussed the policy in the context of federal securities laws in Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975). The Court said that investors should

> have at least as much time to sue under the federal statute as they do under the most analogous state statute. Since the purposes of the securities law are remedial, this best effectuates the congressional policy to provide redress in federal courts for victims of securities fraud.

518 F.2d at 407. Or, more simply, "a person with a cause of action under rule 10b-5 should be able to bring suit in a federal court if he also has a timely cause of action in the state court." 518 F.2d at 409.

These considerations are fully applicable to the Civil Rights Act, which is also remedial and vindicates fundamental rights. See, e.g., Monroe v. Pape, 365 U.S. 167, 174-187 (1961); McNeese v. Board of Education, 373 U.S. 668, 671-673 (1963). If plaintiff's claim for reinstatement is held barred, he will be unable to vindicate in federal court important rights that he could have vindicated in state court had he filed a state mandamus action instead of this lawsuit. This result makes relief less available in federal court than in state court; and in the name not of a federal policy of repose but of parity between limitation periods for similar state and federal actions. As Berry Petroleum suggests, the policy of parity should not be interpreted to make federal relief less available than analogous state relief.

C. The Equitable Limitation of Laches is Appropriate for This Civil Rights Action.

It may be argued that adoption of an equitable limitations period for this § 1983 action is the very judicial usurpation of the function of setting periods of limitations that has been consistently rejected under federal statutes without limitation periods. See, e.g., Auto Workers v. Hoosier Cardinal Corp., supra, 383 U.S. 696 at 701-704. It is also true that courts have ordinarily referred to borrowing limitation periods from state "statutes." See, e.g., id at 704. But examined more closely, federal policy does not bar, and in this case it requires, application of the equitable limitation period which governs a Connecticut mandamus action.

The federal courts are not asked in this case to set an equitable limitation standard as a matter of federal judicial innovation. An equitable standard should govern the reinstatement claim simply because it would govern the most closely analogous state claim. The federal policy of avoiding "bald innovation" by federal courts in this case favors application of an equitable limitation period because the equitable limitation is itself borrowed. A related federal policy is that

> in borrowing a state period of limitation for application to a state cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 464. While Johnson involved a statutory limitation, its rationale is equally applicable where the State sets an equitable limitation on the prosecution of the most closely analogous claim. For if a federal court were to reject the closest analogy to a state claim in order to borrow a statutory rather than equitable limitation period, it would also be rejecting the "State's wisdom" in favor of a federal rule that only statutory limitations may be borrowed. But even if such a rule had some merit, which it does not, it would be precisely the judicial innovation which federal courts have declined to undertake even in order to vindicate vital federal policies, e.g., Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 463-461; Auto Workers v. Hoosier Cardinal Corp., supra, 383 U.S. at 701-704. Moreover, Berry Petroleum's policy of equalizing access to state and federal courts for analogous claims counsels against rejection of an equitable limitation period, for such rejection would create inequality of access and -- as in this case -- bar federal court to plaintiffs whose analogous claims survive in state court.

Nor does application of the doctrine of laches pose any problems of judicial administration. Laches is, after all, a judicial doctrine, and federal courts apply the

doctrine in many contexts, including to federal causes of action without a statute of limitations, see, e.g., Holmberg v. Armbrecht, 327 U.S. 392 (1946); Russell v. Todd, 309 U.S. 280 (1940); and claims by governmental employees to reinstatement, see, e.g., Norris v. United States, 257 U.S. 77 (1921); Nicholas v. United States, 257 U.S. 71 (1921); United States ex rel. Arant v. Lane, 249 U.S. 367 (1919); Jones v. Summerfield, 265 F.2d 124 (D.C. Cir. 1959), cert. denied, 361 U.S. 841 (1959).

D. This Action Is Not Barred By Laches

Since the issue of laches was not addressed by the District Court, and since other issues remain open on remand, it is appropriate that the issue of laches be resolved by the District Court in the first instance. Fran[illegible]. Bowman Transp. Co., 495 F.2d 398, 406 (5th Cir. 1974), rev'd on other grounds, _____U.S._____, 96 S.Ct. 1251 (1976); Sullivan v. Morgan, 155 Conn. 630, 634-635 (1967).

If this Court does reach the issue of laches, it should hold that laches do not bar this action. The doctrine of laches applies only where delay is both inexcusable and prejudicial. Robinson v. Myers, 156 Conn. 510, 519 (1968); Pascale v. Board of Zoning Appeals, 150 Conn. 113, 119 (1962); Bahr Corp. v. O'Brion, 146 Conn. 237, 249 (1959); see Sullivan v. Morgan, supra,

155 Conn. at 634-635. This delay was neither.

Plaintiff has diligently pursued his claim for reinstatement. He filed his original appeal to the Court of Common Pleas January 16, 1970, three days after his discharge. In that appeal he raised claims he seeks to vindicate here, and requested reinstatement with backpay. The Police Board by contrast did not move to dismiss the Court of Common Pleas appeal until the eve of trial late in 1973. They slept on their jurisdictional claim, which they could have raised at least as early as the Superior Court's affirmance of the arbitration award in 1971. Plaintiff's failure to learn until four years after his discharge that a new action would be necessary to win reinstatement is therefore wholly due to the delay of the defendants, who now seek to be rewarded for their delay with dismissal of this action.

Prejudice to the defendants has also been minimized by the pendency of the Court of Common Pleas appeal, which prevented their being lulled into a repose which this action would unfairly disrupt, and plaintiff has been diligent in accumulating set-offs, minimizing the City's potential financial liability, as he would be able to show in the District Court at a hearing on the laches issue.

II. PLAINTIFF IS ENTITLED TO THE BENEFIT OF THE CONNECTICUT STATUTE GOVERNING ACCIDENTAL FAILURES OF SUIT.

Section 52-592 of the Connecticut General Statutes provides in part:

> .... If any action commenced within the the limited by law, has failed one or more times to be tried on its merits because...the writ was abated, or has been erased from the docket for want of jurisdiction, or the action has been otherwise avoided or defeated...for any matter of form; ...the plaintiff ...may commence a new action for the same cause at any time within one year after the determination of the original action....

The dismissal of plaintiff's action in the Court of Common Pleas was for lack of jurisdiction. That court found that the form of the motion calling the court's attention to the lack of jurisdiction -- a motion to dismiss -- was an improper motion, but determined to consider the jurisdictional question anyway. App. 71-72. This case must therefore fall within the meaning of the statutory phrase "erased from the docket for want of jurisdiction", since although defendants in state court did not make the "motion to erase" contemplated by Connecticut procedure, the result was the same as if they had made that motion instead of the improper one they did make. Accordingly, since this action was filed

less than four months after the dismissal of the Court of Common Pleas appeal, this action is not time-barred even if the tort limitation period or some other statute of limitations is applicable. However the District Court held this saving provision inapplicable because "the statutory appeal taken to the Court of Common Pleas has not been regarded as an 'action' within the meaning of the saving statute, see Carbone v. Zoning Board of Appeals, 126 Conn. 602 (1940), cf. Bank Building & Equipment Corp. v. Architectural Examining Bd., 153 Conn. 121 (1965), and the Connecticut courts have not indicated that a contrary construction would result if the situation confronted were not the usual one of successive attempted appeals but one of a frustrated appeal followed by a wholly distinct proceeding by ordinary suit." App. 78.

But the interpretation of the Connecticut saving statute is not solely a question of Connecticut law: as this Court has held in the related context of tolling provisions:

> Yet we must take into consideration that applying [state] doctrine literally might sometimes be unfair....We would have the duty in a civil rights case to find our own interpretation of the state statute under federal common law, since in Civil Rights Act cases, the statute of limitations goes to the remedy and not the creation of the right.

Kaiser v. Cahn, supra, 510 F.2d at 286. This is a case where applying state doctrine literally is unfair. Appeals are excluded from "actions" covered by the saving statute primarily in order to vindicate Connecticut's policy that statutory appeals should be heard and disposed of promptly. Carbone v. Zoning Board of Appeals, supra, 126 Conn. at 608. But that policy does not apply to a case such as this one where the later action sought to be maintained is not an appeal but is a separate action. Federal courts have applied state saving statutes similar to Connecticut's to preserve federal claims from limitation bars, Moore v. Fields, 464 F.2d 549 (4th Cir. 1972); Momand v. Universal Film Exchange, 43 F.Supp. 996 (D.Mass. 1942). Such a course should be followed here in order to vindicate the federal rights of a plaintiff whose claims otherwise would be barred by a state policy that is inapplicable to his case and operates to defeat the federal policy expressed in the Civil Rights Act.

The District Court concluded that "there appears no sound reason to postpone bringing the federal action and accordingly no persuasive justification for suspending the running of the statute of limitations." That is, plaintiff should have filed his Civil Rights Act suit while the Court of Common Pleas appeal was pending. The two cases would then presumably have proceeded on parallel

tracks, with plaintiff, at least as to the reinstatement claim, requesting identical relief from both federal and state court. But whatever the applicability of this reasoning to the damage claim, it is inapplicable to the claim for reinstatement, which plaintiff pursued in the Court of Common Pleas from three days after his discharge until the appeal was dismissed four years later. Considerations of judicial economy as well as the policies of saving statutes such as Connecticut's against procedural default counsel in favor of a liberal construction of the saving statute as a matter of "federal common law" and application of the statute to preserve this action.

CONCLUSION

The District Court erred in holding the complaint time-barred -- at least as to the claim for reinstatement. Its grant of summary judgment to defendants and dismissal of the action should be reversed and the case remanded to the District Court with directions to consider the remaining claims of the parties.

RESPECTFULLY SUBMITTED,

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CERTIFICATION

This is to certify that copies of the foregoing Appellant's Brief and Appendix were mailed first-class, postage pre-paid, on the 30th day of July, 1976, to:

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